Supreme Court of the United States

No. , October Term, 1939

Fuel Credit Corporation, formerly Dobbins Trinity Coal Company, Inc.,
Petitioner,
against
Thomas J. Howard, owner of the Barge "E. T. Halloran",
Respondent,
and
Steam Tug "Russell IV" and Russell Towing Company,
Respondent Impleaded.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

A reference to jurisdictional provisions, proceedings and opinions below is made in the petition.

The facts in the case are stated in the petition.

A. *The Circuit Court of Appeals may not assume the power of substituting its own discretion for that of the Admiralty Trial Court in accepting the testimony of a witness heard in open court, where there has been no abuse of discretion by the Trial Court.*

The principal issue at the trial was whether the port bow corner of the Barge came in contact with a submerged

uncharted object or struck a charted rock on or near the bank of the East River. The District Court heard the oral testimony of Captain Olsen, the Master of the towing tug, and accepted as credible his testimony that the Barge never came nearer than 75 feet from the shore; and that the depth of the water was at no time less than 40 feet. The chart (Exhibit 3, Record 104) shows ample depth of water for this Barge drawing only 6 or 7 feet. There was no bottom damage to the Barge.

The Trial Court remarked:

> "I accept the testimony of, Olsen, Master of the Russell Tug, that he towed the Barge in a proper way."

and made his findings of fact accordingly.

The Circuit Court of Appeals stated in its opinion:

> "We think it more probable that the Barge struck a rock." (R. 132)

The Circuit Court, in thus substituting its own discretion as to the credibility of the witness, assumed power over matters which rest in the discretion of the District Court.

In *Cary-Davis Tug & Barge Co.* v. *United States,* the Circuit Court of Appeals of the 9th Circuit, 8 Fed. (2nd) 324, said at page 325:

> "In the absence of evidence clearly proving the negligence of the McKinley in the respects alleged in the cross-libel, we cannot set aside the conclusions reached by the District Judge, which heard the testimony."

In *American Merchant Marine Ins. Co.* v. *Liberty Co.* (C. C. A. 3rd Circuit), 282 Fed. 514 at page 518 the Court of Appeals said:

> "Although in an appeal in admiralty we are required to consider the testimony *de novo,* we are called upon to observe the rule that findings of fact by a trial judge who saw and heard the witnesses will have great weight with an Appellate Court and will not be disturbed unless they are clearly against the evidence."

In *Lewis* v. *Jones,* 27 Fed. (2nd) 72, the Circuit Court of Appeals of the 4th Circuit said at page 74:

> "it is unnecessary to cite authority to sustain the proposition that the finding of the trial judge, who had the opportunity of seeing the witnesses, hearing their story, judging their appearance, manner, and credibility, on the question of fact, is entitled to great weight, and will not be set aside unless clearly wrong."

In *Merchant's & Miner's Transp. Co.* v. *Nova Scotia S. S. Corp.,* 40 Fed. (2nd) 167, the Circuit Court of Appeals for the First Circuit said at page 168:

> "His (the trial judge's) conclusions should be adopted by this Court—in which an admiralty case is tried de novo—unless plainly wrong." (Citing cases.)

It was manifestly error for the Circuit Court of Appeals to assume the power to dismiss the findings of fact of the District Court and substitute therefor its own version of the happening based, not upon testimony, but upon certain assumed probabilities.

The Circuit Court premised its rejection of the testimony of Olsen on assumptions which the Court admitted were in some respects only possibilities. It said in its opinion (Record, p. 132):

> "While it is true that the Barge sustained no bottom damage, it is by no means impossible that the port corner of the bow could catch upon the projecting side of a jagged rock without the lowest plank striking."

It is submitted that the assumption of power indulged in by the Circuit Court contrary to the established precedents, calls for an exercise of this Court's power of supervision.

Rule 38, Sec. 5, subd. (6) of the Rules of the Supreme Court of the United States.

B. *The ruling of the Circuit Court of Appeals of the Second Circuit that an unexplained sheer on the part of the towing tug constituted negligence is contrary not only to a decision in the First Circuit but also to prior decisions of the Second Circuit. This question should be settled by this Court.*

As an alternative to its opinion as to probabilities of the happening, the Circuit Court announced as a rule of law the following:

> "But really it is immaterial whether the object struck was a submerged rock or a submerged wreck. Whichever it was, the contact and resulting damage occurred during an unexcused sheer which carried the barge close to the shore and into waters which the tug's master never intended her to enter. Evidence establishing such facts is not sufficient in our opinion to rebut the presumption of negligence by which the owner made his prima facie case against the charterer * * * Here the sheer and the object struck are still unexplained."

In the case of *Baltimore & Boston B. Co.* v. *Knickerbocker Steam T. Co.*, (Circuit Court of Appeals, 1st Circuit) 170 Fed. 442, the Court said at page 442:

> "We are of the opinion that the District Court was justified in finding that according to the preponderance of the testimony the barge * * * took a sudden and unusual sheer to starboard, * * *. The finding of the court that the prime cause of the grounding was a sheer to starboard is supported by the testimony of two witnesses, who testified orally before the District Judge not only directly to the fact but also to various manoeuvers of both tugs which can be accounted for only on the theory of a starboard sheer. * * * For the purposes of this appeal we must, in our opinion, consider as proven the fact that the barge took a sudden and decided sheer to starboard, and that it was necessary for the tugs to maneuver to check this sheer. Our doubt, then, must be confined to the question of the skill and judgment with which these movements of the tugs were made. * * * But upon an issue of this character, where the tugs have accounted for the grounding by the showing of a special emergency, and have definitely described movements, not improbable and not necessarily inconsistent with good seamanship, all presumption of negligence from the mere fact of grounding then disappears, and the burden is cast upon the libelant to establish negligence by a clear preponderance of proof.
>
> "Upon the record as it stands, we are of the opinion that the burden was upon the libelant to show that in checking the starboard sheer of the barge the tugs were handled unskillfully, and that with better handling the barge could have been kept within the limits of the channel. * * *

> "We find ourselves unable to say that there was any inexcusable fault in the handling of the barge by the tugs after the emergency of a sudden sheer in a narrow channel, and upon the whole we agree with the conclusion of the District Judge that the libelant did not sustain its contention that the respondent was at fault."

See also *Algic*, 13 Fed. (Sup.) page 834 at page 838.

In the case of *The Lady Wimett* (District Court, N. D., N. Y.), 92 Fed. 399, the tow took a sudden sheer to starboard, the chock and cleat gave way when the tug attempted to overcome the sheer and the tow struck the pier and sunk. The Court held that there was nothing in such evidence to show that the tug was at fault, stating at page 400:

> "A tug, using ordinary care, is not liable for the sudden sheering of the tow. The Stranger, 1 Brown Adm. 281, Fed. case #13,525."

This case was affirmed by the Circuit Court of Appeals (2nd Circuit) in 99 Fed. 1004 (40 C. C. A. 212).

As in the case of *The Lady Wimett* so in the case at bar, the Barge "E. T. Halloran" took a sudden sheer and the chock and cleat gave way when the tug attempted to overcome the sheer. The Captain, Olsen, testified before the Trial Judge that he made every effort to correct the sheer (*fols.* 142 to 145). However, in the instant case the undisputed testimony showed that the "E. T. Halloran" was pulled out of the sheer before it struck the shore (*fol.* 144). *A fortiori*, the rules laid down by the Courts in the two cases cited, should have been applied by the Circuit Court in this case.

The Court of Appeals has based its reversal upon alternate propositions; First—That the District Court should

not have accepted the testimony of Olsen because of the possibility that he was mistaken. Second,—That, even if the testimony of Olsen were true, the Petitioner should have explained the cause of the sudden sheer in order to absolve itself from negligence. In view of the fact that the barge drew only 7 feet and at no time was in a depth of water of less than 40 feet, the sheer and damage must have been caused by the striking of a submerged uncharted object which, obviously, could not be identified.

The First and the Second Circuits in previous decisions have refused to impose such an onerous burden upon a towing Master. A diligent search of authorities reveals no previous case of a tug captain in charge of the tow being condemned for striking an unknown uncharted, submerged object while in deep water, where the only foundation for a charge of negligence is an unexplained sudden sheer.

There is no distinction in this case between the burden on the tower and the charterer, as it is admitted that the charterer has shown everything it did with the Barge during the period of charter and the damage was definitely localized in time and place. Accordingly, the charterer was only liable if the tow was negligently navigated at such time. (*Hildebrandt* v. *Flower Ltge. Co.*, 277 Fed. 436, affirmed 277 Fed. 438; *The Roslyn*, 93 Fed. (2nd) 278.)

The conflict of law, set up by the reversal of the Circuit Court in this case, should be settled by this Court.

C. *The Prayer of the Petitioner should be granted.*

Dated, September 5, 1940.

Respectfully submitted

THEODORE L. BAILEY
Proctor for Petitioner.